UNITED STATES

v.

HEIRS OF ANNIE DAVIS

IBLA 2001-170 Decided May 13, 2003

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer rejecting a Native allotment application. AA-33472.

Affirmed.

1. Alaska: Native Allotments

A Native allotment application made pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), is properly rejected where the applicant's heirs fail to overcome, by a preponderance of the evidence offered in a contest proceeding, the Government's prima facie case that the applicant had failed to initiate qualifying use and occupancy prior to the 1909 withdrawal of the land from entry under the 1906 Act, by substantially using and occupying the land to the potential exclusion of others.

APPEARANCES: Harold J. Curran, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant; Maria Lisowski, Esq., Office of the General Counsel, U.S. Department of Agriculture, Juneau, Alaska, for the Forest Service; Joseph D. Darnell, Esq., Office of the Regional Slicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

William E. (Buddy) Howard (appellant) has appealed from the February 16, 2001, decision of Administrative Law Judge Harvey C. Sweitzer rejecting Native allotment application AA-33472. Appellant is a grandson of applicant Annie Davis (née Johnson) and one of her heirs.

On December 17, 1956, Davis filed a Native allotment application, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), and its implementing regulations (43 CFR Subpart 2561), seeking a 4-acre island known as Haley Point in Fish Bay near Baranof Island. [1/] The island is located about 15 miles northwest of Sitka, Alaska, in protracted sec. 10, T. 52 S., R. 61 E., Copper River Meridian, Alaska, within the Tongass National Forest. In her application, Davis indicated that she lived at that time in Sitka and claimed qualifying use and occupancy of the land "since time immemorial by me and my ancestors." (Ex. 3 at 1.)

The claimed land was withdrawn from entry under the 1906 Act on February 16, 1909, pursuant to Presidential Proclamation No. 846 (35 Stat. 2226-28 (1909)). See 35 Stat. 2152 (1909); Ex. 2; Tr. 16 and 19. The proclamation stated that it "shall not be so construed as to deprive any person of any valid right * * * acquired under any act of Congress relating to the Territory of Alaska." 35 Stat. at 2228. The lands in question are now under the administrative jurisdiction of the United States Forest Service (USFS), U.S. Department of Agriculture.

Davis died on September 27, 1959, and, until the filing of the present appeal, her Native allotment application was pursued by her heirs.

On January 8, 1999, BLM, acting on behalf of the United States, issued a contest complaint, challenging the Native allotment application on the basis that Davis had failed to satisfy the use and occupancy requirements of section 3 of the Act of May 17, 1906, as amended, 43 U.S.C. § 270-3 (1970), and 43 CFR 2561.0-5(a). BLM charged that Davis had failed to initiate qualifying use and occupancy "in her own right, as an independent citizen" prior to the February 1909 forest withdrawal and had therefore failed to acquire valid existing rights which survived the withdrawal. Answers denying the charges were filed by persons identified as Davis'

[1/] The 1906 Act was repealed effective Dec. 18, 1971, subject to pending Native allotment applications, by sec. 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (2000).

The record indicates that the application was rejected in August 1961 but reinstated in April 1982.

"heir[s], potential heir[s] or representative[s]" (the Heirs) and the matter was assigned to Judge Sweitzer for a hearing and decision. [2/]

Judge Sweitzer held a hearing on August 14, 2000, in Sitka, Alaska, [3/] and issued his decision rejecting Davis' allotment application on February 16, 2001. He held therein that the Heirs (acting in the role of contestee) had failed to overcome, by a preponderance of the evidence, BLM's prima facie case that Davis had failed to initiate qualifying use and occupancy of the land claimed by her prior to its February 1909 withdrawal from entry under the 1906 Act and was therefore not entitled to a Native allotment: "At the hearing, Contestee Howard failed to adequately cure the deficiencies in the evidence of record so as to establish that Mrs. Davis[] initiated use and occupancy, prior to withdrawal, which qualified as substantially continuous use and occupancy, at least potentially exclusive of others, as an independent citizen." (Decision at 10.)

Appellant Howard alone appealed from Judge Sweitzer's February 2001 decision. Before Judge Sweitzer, counsel for appellant indicated that he represented only appellant. (Entry of Appearance filed with the Hearings Division on July 31, 2000; Decision at 2; Tr. 7-8.) Likewise, appellant's notice of appeal (NA) and statement of reasons (SOR) indicate that he is pursuing the appeal solely on his own behalf. (NA at 1; SOR at 1.) In a Supplemental SOR, appellant states that "the Board should overrule the Sweitzer Decision and award the Heirs of Annie Davis her allotment." (Supplemental SOR dated Sept. 7, 2001, at 9.) However, there is no record that any of the other Heirs ever filed a notice of appeal from Judge Sweitzer's February 2001 decision as required by 43 CFR 4.411(a), despite the fact that it was duly served on what was then considered to be the Heirs' counsel and Davis' other Heirs (individually or in care of the Sitka Tribe of Alaska), by certified mail, return receipt requested. In the absence of cognizable appeals by the other Heirs, Judge Sweitzer's February 2001 decision has become administratively final for the Department, so far as concerns the interest which any of the Heirs, other than

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[2/] Prior to the hearing, on July 26, 2000, Judge Sweitzer issued an order denying BLM's motion to dismiss the pending contest on the basis that the validity of Davis' application had already been resolved in Shields v. United States, 504 F. Supp. 1216 (D. Alaska 1981), aff'd, 698 F.2d 987 (9th Cir.), cert. denied, 464 U.S. 816 (1983). That issue has not been raised in this appeal.

[3/] Judge Sweitzer kept the hearing record open following the hearing to admit into evidence the Deposition of Steve J. Langdon, a Professor of Anthropology at the University of Alaska. (Tr. 47-48, 172-73.) Langdon was examined on the record by the Heirs and cross-examined by BLM on Nov. 29, 2000, in Anchorage, Alaska, and the transcript of his Deposition was subsequently admitted into evidence. (Decision at 2.) The Deposition will be cited as "Dep."

appellant Howard, have in Native allotment application AA-33472. Heirs of Herculano Montoya, 137 IBLA 142, 146 (1996); Turner Brothers Inc. v. OSM, 102 IBLA 111, 121 (1988).

In the case of land claimed in a National Forest, a Native allotment may be granted in accordance with section 2 of the Act of May 17, 1906, as amended, 43 U.S.C. § 270-2 (1970), (1) where "occupancy" is shown to have been initiated "prior to the establishment of the particular forest" or (2) where the Secretary of Agriculture "certifies that the land * * * is chiefly valuable for agricultural or grazing purposes."

Concerning the second proviso of section 2 of the 1906 Act, the Forest Service determined here that the land claimed by Davis was not chiefly valuable for agricultural or grazing purposes. (Ex. 5.) It noted that the area on the island which was physically suitable for gardening or other agricultural pursuits was not large enough to produce a commercial crop, or even sustain a small family over time, and was therefore not valuable for agriculture (or grazing). (Ex. 5.) Judge Sweitzer held that this was sufficient to constitute a determination within the meaning of section 2 of the 1906 Act and that such a determination was subject to administrative review only within the Department of Agriculture, and not by this Department. (Decision at 6, 9 (citing James R. Hensher, 85 IBLA 343, 352, 92 I.D. 140, 145 (1985) (Indian allotment application, under 25 U.S.C. § 337 (2000)) and Arthur R. Martin, 41 IBLA 224, 226 (1979)).)

Although appellant challenges this ruling (SOR at 5, 19-20; Supplemental SOR at 4, 15-18), he admits that this Department "must follow" the Forest Service's determination. (SOR at 19; see Supplemental SOR at 4.) However, he argues that, since this Department is charged with adjudicating Native allotment applications, Judge Sweitzer erred by not requiring BLM to refer the case back to USFS for clarification or reconsideration of its determination, since (he maintains) that determination was incorrect. (SOR at 5; Supplemental SOR at 4.)

Judge Sweitzer properly held that this Department is bound by a USFS "chiefly valuable" determination under 43 U.S.C. § 270-2 (1970), even in the context of a Native allotment adjudication. Arthur R. Martin, 41 IBLA at 226. That ends the matter. [4/]

[4/] Even if we were to hold that the Department has the authority to request clarification of such a determination, we would note that we are not convinced that USFS employed an incorrect legal standard, failed to adequately support its determination with facts and/or arguments, or otherwise erred in its determination, such that referral would be unwarranted. Estate of Benjamin A. Wright, 23 IBLA 120, 122 (1975).

Accordingly, in order for Davis' allotment to be valid, she had to comply with the first proviso of section 2 of the 1906 Act, where "occupancy" is shown to have been initiated "prior to the establishment of the particular forest." Under that proviso, it is not merely occupancy, but rather qualifying personal use and occupancy under the Native Allotment Act, that must be shown to have predated the withdrawal. See Shields v. United States, 504 F. Supp. at 1220; Forest Service (Heirs of Surge Bay Joe), 141 IBLA 211, 214 (1997); Eva Wilson Davis, 136 IBLA 258, 264 (1996); Forest Service (Heirs of Frank Kitka), 133 IBLA 219, 222 (1995). Section 3 of the Act of May 17, 1906, requires that, in order to qualify for an allotment of land, a Native applicant must submit satisfactory proof that he has engaged in "substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. § 270!3 (1970). Regulation 43 CFR 2561.0!5(a) states that such use and occupancy

> contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

In order to demonstrate that the land was used and occupied to the potential exclusion of others, it must be shown that others knew or should have known that the Native applicant asserted a superior right to the land because he actually used or occupied the land and/or left behind physical evidence of such use or occupancy, sufficient to put others on notice of the assertion of such a right, or because others acknowledged in some way that assertion. See United States v. Pestrikoff, 134 IBLA 277, 288-89 (1995), and cases cited therein.

When the United States contests a Native allotment application, it has the burden of presenting sufficient evidence to establish a prima facie case that the applicant failed to comply with the use and occupancy requirements of section 3 of the 1906 Act and 43 CFR 2561.0-5(a), or was otherwise not entitled to a Native allotment under the 1906 Act, whereupon the burden falls upon the applicant to overcome that case by a preponderance of the evidence. United States v. Heirs of Thomas Bennett, 144 IBLA 371, 381 (1998).

We agree with Judge Sweitzer's holding that BLM established a prima facie case that Davis was not entitled to a Native allotment under the 1906 Act and its implementing regulations. (Decision at 9-10.) He properly held:

> The evidence of record, prior to the presentation of Contestees' case-in-chief, was clearly insufficient to show that Mrs. Davis, prior to the withdrawal of the land, began use and occupancy of a qualifying

> nature, i.e., substantially continuous use, at least potentially exclusive of others, as an independent citizen.
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> That evidence consists of vague statements that Mrs. Davis used the land since time immemorial. Lacking is any specific evidence of the nature or extent of her use or of the independency of her use prior to withdrawal at the age of 15. Without such evidence, there is no affirmative showing that qualifying use was initiated prior to withdrawal.

(Decision at 9-10.) Davis never specified the date or even the year she (rather than her ancestors) initiated use and occupancy of the land claimed by her, either in her allotment application (Ex. 3; Tr. 15-16) or in subsequent statements made by her or by her husband (in her presence), during an October 22, 1957, interview conducted by a District Forest Ranger. Further, although an October 16, 1957, field examination by USFS discovered "very good evidence of previous occupation," there was none dating back prior to the 1909 withdrawal. Davis and her husband told the inspector that she claimed the island through use of it by her husband's family, not by herself. (Ex. 4.) We agree with Judge Sweitzer that a prima facie case was established by virtue of the fact that the evidence in the record "does not affirmatively show compliance with all of the statutory and regulatory requirements necessary to obtain title to a Native allotment under the 1906 Act." (Decision at 9 (quoting from United States v. Galbraith, 134 IBLA 75, 101 (1995)).)

Nor did the Heirs present adequate evidence at the hearing to overcome this prima facie case of invalidity. We find insufficient evidence to conclude that Davis herself used and occupied the land as an independent citizen on her own behalf as required by the 1906 Act and 43 CFR 2561.0-5(a), or even at all, prior to the February 1909 withdrawal. See Tr. 83-85, 88-89, 94, 103, 146-48, 165, 170-72; Ex. I at 2-7, 9-10; Dep. 25-26. At its best, the evidence, which consists only of the hearsay report of appellant (based on his conversations in the 1950's with Davis), places Davis on the island performing the subsistence activities which are generally known to have been undertaken by women of Davis' age. See, e.g., Tr. 85-86, 94, 103; Dep. 32, 69-70. However, none of the evidence pinpoints when this occurred, except to indicate that it was while she was a young woman, some time before her marriage in 1912, which may or may not have been prior to the 1909 withdrawal. (Tr. 103.) Further, even assuming that Davis' use and occupancy occurred before the 1909 withdrawal, we are not persuaded that it was independent of the elder members of the Davis family. See, e.g., United States v. Bennett, 92 IBLA 174, 178-79 (1986). Nor are we convinced that such use and occupancy was, in fact, to the potential exclusion of others; nothing shows that it was undertaken in such a manner as to put others on notice that she was using and occupying the land, or that others

recognized the land as subject to her use and occupancy. [5/] The record indicates, to the contrary, that the claimed island was considered to belong to the Tschukahnaydee clan. (Tr. 82, 101-02.)

Thus, we agree with Judge Sweitzer's determination that the evidence offered by the Heirs was insufficient to overcome, by a preponderance of the evidence, the Government's prima facie case that Davis did not engage in substantial actual possession and use of the land, to the potential exclusion of others, before the withdrawal. Compare with United States v. Heirs of Alec Dolchok, 140 IBLA 45, 54-56 (1997). We therefore conclude that Judge Sweitzer, in his February 2001 decision, properly rejected the Native allotment application, AA-33472, being pursued by the Heirs.

To the extent not specifically addressed herein, appellant's arguments have been considered and are rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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David L. Hughes
Administrative Judge

I concur:

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James F. Roberts
Administrative Judge

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[5/] Much of the evidence offered by the Heirs concerned use and occupancy of the land by Davis following her marriage to her husband in 1912. See, e.g., Tr. 70-78, 103-04, 114-15, 125-33, 135-45; Ex. C (Affidavit of Herman Davis, dated May 30, 1997); Ex. D (Affidavit of Joseph Howard, dated June 10, 1997); Ex. E (Affidavit of Sarah James, dated May 16, 1997); Ex. F (Joint Declaration of Elizabeth Houston and Gertrude Wright, dated May 28, 1997); Ex. G (Declaration of Sharon A. Parks, dated May 28, 1997); Ex. I at 8, 10-11; Dep. 39-45. Regardless of whether such use and occupancy by Davis (which seems clearly to have occurred along with her husband and other members of their extended family) was qualifying, it has no bearing on the critical question whether she herself used and occupied the land prior to the February 1909 withdrawal.